

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NUMBER: 6485/2019

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED</u>
DATE: <u>18/06/20</u> SIGNATURE: <u>[Signature]</u>	

In the matter between:

PHOKWANE FUNERAL DIRECTORS CC

APPLICANT

AND

**THE SHERIFF OF THE MAGISTRATE'S COURT FOR
DISTRICT NEBO**

1st RESPONDENT

RATALE MASHIFANE ATTORNEYS

2ND RESPONDENT

LEBOGANG DIAGO

3RD RESPONDENT

BETTY MAJOMANE MAISELA

4TH RESPONDENT

COMFORT MOKGATLA MOGADIME

5TH RESPONDENT

MASEKHELA PATRICIA MATULUDI	6TH RESPONDENT
MAPHEFO MAUPA INNOCENTIA MASHIFANE	7TH RESPONDENT
MAKLAKA NTHABISENG THELMA	8TH RESPONDENT
SHOKOANE KHOMATJO	9TH RESPONDENT
MOLOTO JULIA PHASHA	10TH RESPONDENT
NKUNYANE MARGARET MATJOMANE	11TH RESPONDENT
MAMOKETE MOGADIME	12TH RESPONDENT
PHOMELELO EMMA PHOKU	13TH RESPONDENT
ELIZABETH MPHO MATENJI	14TH RESPONDENT
NANCY NGWANAMOLEKANE MAGASHULA	15TH RESPONDENT
HAPPHY NKGUDI	16TH RESPONDENT
NENE MARIA MASUKU	17TH RESPONDENT
THELMA MARIPANE	18TH RESPONDENT
MONICA MOKGATLA PHAKA	19TH RESPONDENT
HLAKOTJE FORTUNE MASEHLA	20TH RESPONDENT
REINETT MPONANE MASHIFANE	21TH RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The applicant is Phokwane Funeral Directors CC. The third to twenty first respondents have issued simple summons against Phokwane Funeral Directors (Pty) Ltd under various case numbers in the Magistrate Court Nebo. They proceeded to obtain default judgments against Phokwane Funeral Directors (Pty) Ltd. Thereafter they issued writs of execution and attached movable assets.
- [2] After the attachment of the assets, the applicant brought an application on urgent basis seeking an order that the attachments in respect of the warrants of execution under various case numbers issued by Magistrate Court Nebo be set aside. They were further seeking an order that the first and second respondents be interdicted from executing any and further warrants of execution at any premises of the applicant wherein the defendant is Phokwane Funeral Directors (Pty) Ltd. The first respondent is the sheriff of the Magistrate Court Nebo, whilst the second respondent is the attorney of the third to twenty first respondents. The applicant's application was served only on the first and second respondents. The second respondent is opposing the applicant's application.
- [3] When this application was heard, the attachments of the movable assets have already lapsed in terms of Rule 41(7) (E) of the Magistrate's Court Rules of Court. Since the prayer for setting aside of the warrants was rendered moot by the lapse of the attachment, the applicant proceeded to argue the prayers in

relation to interdict and costs on a punitive scale against both first and second respondents jointly and severally.

- [4] The background facts are as follows. On 12th June 2018 the second respondent acting on behalf of third to twenty first respondents issued letters of demand against Phokwane Funeral Directors (Pty) Ltd. The cause of action was for alleged termination of contracts of the third to twenty first respondents and also failure by Phokwane Funeral Directors (Pty) Ltd to pay them their stipend in relation to the learner-ship agreement. Phokwane Funeral Directors failed to comply with the letters of demand. The second respondent proceeded to issue summons against Phokwane Funeral Directors (Pty) Ltd.
- [5] On the 27th May 2019 the applicant through its attorneys wrote a letter to the second respondent informing it that the applicant is a close corporation and that they never gave any permission to Phokwane Funeral Directors (Pty) Ltd to share a name similar, alternatively exactly to that of the applicant. They further denied entering into any agreements with the third to twenty first respondents. They further informed the second respondent to serve any judgment or execution taken against the Pty Ltd at the Pty Ltd's address and not that of the applicant.
- [6] The second respondent replied per its letter dated 28th May 2019 stating that they have not properly cited the applicant. They further stated that the applicant failed to enter appearance to defend to any of the matters and that its records shows that they had a number of communications and meetings with the applicant, and at no stage did the applicant inform them that the company was wrongly or incorrectly cited. The second respondent further stated that the applicant had satisfied some of the judgments based on the same facts.

- [7] The applicant's attorneys of record responded per their letter dated 20th June 2019 stating that any payments which might have been made has been made in error and they will demand a refund. They further stated that the applicant's trading address is in Pretoria and that the applicant was never served with any summons at that address. They concluded by informing the second respondent to execute the writs that they might have obtained at Phokwane Funeral Directors (Pty) Ltd address and not at the address of the applicant.
- [8] On the 3rd July 2019 the second respondent proceeded to issue the writs of execution against Phokwane Funeral Directors (Pty) Ltd. On the 9th July 2019 the writs of execution were handed over to the first respondent for execution. On 22nd July 2019 and 12th September 2019 the first respondent attached assets at the applicant's premises in Phokwane village and placed them under judicial attachment. On 22nd July 2019 the applicant's attorneys wrote a letter to the first respondent informing it that it has executed the warrants against a wrong entity.
- [9] On 26th September 2019 the applicant's attorneys wrote a letter to second respondent giving the second respondent 24 hours to instruct the first respondent to release the goods under attachment failing which they will bring an urgent application. The second respondent failed to comply with the demand and on 1st October 2019 the applicant instituted the present application on urgent basis. The application was set down to be heard on 15th October 2019.
- [10] On 6th October 2019 the applicant's attorneys wrote a letter to the second respondent replying to the second respondent's letter dated 12th July 2018. In their letter the applicant's attorneys denied the applicant ever concluding any

agreements with the third to twenty first respondents and they also denied the applicant's indebtedness to the third to twenty first respondents. On 15th October 2019 the applicant's application was struck off the roll of urgent applications due to lack of urgency.

[11] In its founding affidavit, the applicant has attached the records from the Companies and Intellectual Property Commission (CIPC) for both Phokwane Funeral Directors CC and Phokwane Funeral Directors (Pty) Ltd. According to the records of CIPC, Phokwane Funeral Directors CC has one active member who is Maupa Masaku Melidah, the deponent of the applicant's founding affidavit. It also has four inactive members who are Sipho James Maupa who is deceased. The other three inactive members are Mokgadi Tshekgofatjo Maupa, Richard Mokgethi Maupa and Thabang Maupa who have all resigned from the CC. With regard to Phokwane Funeral Directors (Pty) Ltd, the active directors are Fata Richard Maupa and James Sipho Maupa. The registered address of Phokwane Funeral Directors CC has been stated as suite 1, 267 Waterkloof Road Brooklyn Pretoria, whilst that of Phokwane Funeral Directors (Pty) Ltd has been stated as 1st Floor Gani House, 90 Bok Street Polokwane.

[12] The second respondent in its founding affidavit has stated that it was mandated by the third to twenty first respondents to institute action against the applicant. That after they issued letters of demand against the applicant, the applicant's attorneys of record did not place the citation of its name in dispute. According to the second respondent, both Phokwane Funeral Directors CC and Phokwane Funeral Directors (Pty) Ltd are one and the same entity. The second respondent has also stated that the applicant has settled other similar claims around March and April 2018 after it became aware of the judgments.

- [13] As I have pointed out in the paragraph 3 above, the applicant has abandoned its first prayer of seeking to set aside the warrants of execution. What remains for this court to determine is whether the applicant has met the requisites for the granting of a final interdict, and if successful whether the circumstances of this case warrants a punitive costs order against the first and second respondents jointly and severally.
- [14] It is settled law that the requirements for the granting of a final interdict are (a) clear right; (b) unlawful interference with that right, actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy. **(See Van Deventer v Ivory Sun Trading 77¹ and Hotz v UCT²)**
- [15] There are two entities with the same name and the difference is that one is a closed corporation and the other one is a Pty company limited. Both entities are juristic persons capable to sue or being sued. The close corporation has one member whilst the company has two directors. The member of the CC shares the same surname with the directors of the Pty Ltd. Even though at some stage the CC had a member Sipho James Maupa who shares the same names as one of the directors of the Pty Ltd, they don't share the same ID numbers. Even though the member and directors of both the CC and company might have been somehow related in blood or through sharing the same surname, the two separate entities remained independent from each other, and also did not share the same registered address.
- [16] The second respondent on the other hand acting on instructions from its clients who are the third to twenty first respondents chose to institute action against

¹ 2015 (3) SA 532 (SCA)

² 2017 (2) SA 485 (SCA)

the Pty Ltd. The second respondent on numerous occasions was informed that the applicant did not enter into any agreements with the third to twenty first respondents. The second respondent acknowledged that it had wrongly cited the applicant in its papers but that the applicant and the Pty Ltd is one and the same entity. The second respondent persisted with that argument even in this court and relied on the case of **Foxlake Investment v Ultimate Raft Foundation Design**³ wherein at para 14 the court said:

“As stated earlier, Foxway and Foxlake share the same registered address, receptionist and managing director. The copy of the agreement on which the claim is based was attached to the original summons. In my view when the summons was served on the registered address of both Foxway and Foxlake, Foxway recognised its connection with the claim notwithstanding the error in its description. The amendment sought by the respondents in the court a quo did not seek to introduce a new legal entity as the first defendant...”

- [17] In the Foxlake case the respondents were seeking an amendment to its particulars of claim so that the one entity can be cited in the alternative as a party to the proceeding. The respondent effected that amendment after an exception was served on them. In the case at hand several letters were written to the second respondent making him aware that it is serving its documents on a wrong entity. Instead of amending its papers or joining the applicant to the proceedings, it insisted that the two entities are one and the same thing. In Foxlake case the two entities shared the same registered address and managing directors of which is not what happened in the present case. In my view, Foxlake case is distinguishable from the present case in that the

³ [2016] ZASCA 54 (01 April 2016)

respondents wanted to cite the two entities in the proceedings whilst that is not what the second respondent wanted to achieve in this case.

- [18] Both the CC and the (Pty) Ltd are two separate entities independent from each other. In case the second respondent was in doubt as which was the correct party to the proceedings due to their confusing names, it should have cited both entities. If it was unaware at the time of the institution of the action, when it was made aware that the two are separate entities, it should have amended its citation of the parties or joined the applicant to the proceedings.
- [19] The attached goods were in the possession of the applicant and the applicant has a right to manage and control them without any disturbance. In my view, the applicant has established a clear right to the attached goods and has therefore satisfied the first requirement.
- [20] Since the CC and (Pty) Ltd are two separate entities which had different registered addresses and different member /directors, by attaching the goods in possession and control of the applicant, there was an unlawful interference with its right to properly manage and control the said goods. In my view, the applicant has established the second requirement.
- [21] With regard to the third requirement, it was held in **Hotz v UCT** *supra*, that the purpose of an interdict is to put an end to conduct in breach of the applicant's right, and that the existence of another remedy will only exclude the grant of an interdict where the proposed alternative will afford the injured party a remedy that gives it similar protection to an interdict against the injury that is occurring or is apprehended. Even though the attachment has lapsed, that does not prevent the second respondent from reissuing the writs and place the applicant

in the same predicament. Therefore, the lapse of the attachment does not solve the problem and the applicant will therefore not be afforded adequate protection. I am therefore satisfied that the applicant has established the third requirement.

- [22] Turning to costs, in **Limpopo Legal Solutions and Another v Eskom Holdings SOC Limited**⁴ the court said:

"In Nel, the then-Appellate Division held:

"The true explanation of awards of attorney and client costs not expressly authorised by statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation."

- [23] An award of costs on punitive scale is awarded in exceptional cases. The second respondent was warned on several occasions that it is serving its papers on a wrong entity, but it deliberately ignored the warnings and insisted that the two entities were one and the same whilst there is proof that they were two separate entities independent from each other. The second respondent has displayed arrogance in ignoring the warnings. Despite that, the second respondent persisted with its opposition of the applicant's application despite the fact that it was having a weak defence. In my view, that amount to misuse of court processes and unnecessarily putting the applicant out of pocket. The

⁴ [2017] ZACC 34 at para 35

intention of the applicant was to amicably resolve the matter without incurring unnecessary legal costs.

[24] Even though the second respondent was acting on the mandate of the third to twenty first respondents, it was not supposed to blindly take instructions which might lead to an abuse of court processes. It is the duty of a legal practitioner to advise its clients properly. If the instruction given to him/her will compromise him/her, he/she must simply withdraw from the case and not proceed with the instructions for the sake of money. In my view, the second respondent by proceeding with these type of instructions despite been warned in advance amounted to negligence and recklessness on its part and should therefore be liable for the costs of this application. In my view, this is one of the exceptional cases that deserves costs on a punitive scale. I don't find any reason why the first respondent should also be held liable for the costs of the application jointly with the second respondent.

[25] In the result I make the following order:

25.1. The first and second respondents are interdicted from executing any and all further warrants of execution at any premises of the applicant wherein the Defendant is Phokwane Funeral Directors (Pty) Ltd only in relation to the case numbers mentioned in the notice of motion.

25.2. The second respondent to pay the costs of the applicant on a scale as between attorney and client.



MF. KGANYAGO J

JUDGE OF HIGH COURT OF SOUTH AFRICA,

LIMPOPO DIVISION, POLOKWANE

APPEARANCE:

COUNSEL FOR APPLICANT

: ADV M. BRONKHORST

INSTRUCTED BY

: FVS ATTORNEYS

COUNSEL FOR SECOND RESPONDENT : MR MMAKOLA

INSTRUCTED BY

: MMAKOLA MATSIMELA INC

DATE OF HEARING

: 25 MAY 2020

DATE OF JUDGEMENT

: 18th JUNE 2020